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Nos. 90-334 and 90-340

In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES N. STEPHENS

v.

SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES

JAMES N. STEPHENS

v.

TERRY S. COLEMAN AND ISABEL P. DUNST

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, in applying for the position of Regional Attorney in the Department of Health and Human Services, was entitled to a preference under the Veterans Preference Act, 5 U.S.C. 2108 and 3318(b)(3), and whether such a claim of entitlement is subject to judicial review in the circumstances of this case.

2. Whether Exemptions 5 and 6 of the Freedom of Information Act exempted from disclosure certain personnel records of applicants for the position of Regional Attorney that petitioner sought.

3. Whether the district court lacked personal jurisdiction over the individual federal respondents.

4. Whether, despite the Civil Service Reform Act of 1978, petitioner may pursue a *Bivens* action based on the responsible federal officials' employment decision.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-334

JAMES N. STEPHENS

v.

SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES

No. 90-340

JAMES N. STEPHENS

v.

TERRY S. COLEMAN AND ISABEL P. DUNST

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 901 F.2d 1571.[1] The opinion of the district court in No. 90-334 (Pet. App. 13a-26a) is unreported. The opinion of the district court in No.

[1] "Pet. App." refers to the appendix to the petition in No. 90-334.

90-340 (90-340 Pet. App. 13a-32a) is reported at 712 F. Supp. 1571.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1990. The petitions for a writ of certiorari were each filed on August 20, 1990. The jurisdiction of this Court in invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, petitioner, a Department of Health and Human Services Deputy Regional Attorney who was then serving as the Acting Regional Attorney in the Atlanta office (Region IV), applied for the permanent position. Respondent Dunst, an HHS Deputy Counsel, came to Atlanta to interview petitioner and two other applicants. According to petitioner, Dunst rated him as not qualified because of his refusal to criticize his supervisor. In mid-August 1985, respondent Coleman, HHS's principal Deputy Counsel in Washington, D.C., telephoned petitioner in Atlanta and told him that he had not been selected for the promotion. Pet. App. 3a; 90-340 Pet. App. 18a; Pet. 5, 7-8.[2]

In September 1985, petitioner filed a grievance with the HHS Office of General Counsel (OGC), alleging that the selection of the Region IV Regional Attorney violated applicable agency and federal regulations. Pet. App. 3a. Petitioner also filed a separate request with HHS under the Freedom of Information Act for various documents related to the selection of the Regional Attorney, including

> applications, notes of interviews, evaluations and memos on all candidates for the position * * *, in

[2] "Pet." refers to the petition in No. 90-334.

> addition to records on rating, ranking and grouping of candidates, scoring matrices and background checks and reference checks on candidates from Regional Directors and other persons shown as references.

Id. at 23a.

On September 27, 1985, HHS advised petitioner that under Exemptions 5 and 6 of the Freedom of Information Act, 5 U.S.C. 552(b)(5) and (6),[3] it was withholding—or deleting information from—a number of documents. HHS released, among other documents, the applications and scoring matrices of petitioner and the candidate selected for the Regional Attorney position. Pet. App. 23a-25a.

In early October 1985, OGC rejected petitioner's grievance, concluding that "[n]onselection for promotion from a group of properly ranked and certified candidates is excluded from the grievance coverage." Pet. 5 (internal quotation marks omitted). Petitioner then filed a second grievance alleging additional errors in the selection process, including an improper ranking of candidates. OGC rejected that grievance in November 1985. In January 1986, HHS denied petitioner's request for an investigation and hearing before another grievance examiner. *Id.* at 6.

2. On August 26, 1986, petitioner filed a federal court action against HHS, challenging on constitutional and statutory grounds the agency's decision

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[3] These provisions exempt from disclosure under FOIA "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. 552(b)(5), and "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6).

not to promote him, its rejection of his grievances, and its failure to release documents under FOIA. Pet. App. 13a-14a. The next day, petitioner filed a federal court action under *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), against respondents Coleman and Dunst. Petitioner sought monetary and injunctive relief, alleging that respondents' decision not to promote him violated the First and Fifth Amendments. 90-340 Pet. App. 13a.

a. In April 1989, the district court issued an order dismissing petitioner's promotion and grievance claims against HHS,[4] and granting the agency's motion for summary judgment on petitioner's FOIA claim. Pet. App. 13a-26a. The court determined that the actions about which petitioner complained fell within the category of "prohibited personnel practices" under the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111. Pet. App. 17a-18a. Following decisions such as *United States* v. *Fausto*, 484 U.S. 439 (1988), and *Bush* v. *Lucas*, 462 U.S. 367 (1983), the court therefore concluded that the provisions of the CSRA, *i.e.*, review by the agency's OSC, were the exclusive means for

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[4] While petitioner's action was pending before the district court, petitioner filed a complaint with the HHS Office of Special Counsel (OSC), alleging that the agency had improperly denied him a promotion. After a review, OSC rejected the complaint "on the ground that non-selection for promotion from a group of properly ranked certified candidates is excluded from grievance coverage." Pet. App. 15a. (To the extent petitioner's complaint raised allegations of discrimination and retaliation, OSC adhered to its policy of having such matters resolved through the "equal employment opportunity process," with recourse to the EEOC.) In these circumstances, OSC declined to refer petitioner's complaint to the Merit Systems Protection Board. *Ibid.*

review of petitioner's personnel claims. Pet. App. 18a-22a.[5]

Turning to petitioner's claim under FOIA, the court determined that since the applications "were very detailed and the information contained therein would be highly personal," and since petitioner had not "shown that there is a strong public interest in the disclosure of this personal information," such applications "may properly be withheld pursuant to 5 U.S.C. § 552(b)(6)." Pet. App. 24a. The scoring matrices, the court further determined, "represent[] subjective opinions and recommendations which were submitted as a part of the deliberations of the selection process." *Id.* at 25a. The court therefore concluded that such documents "may properly be withheld under the deliberative process privilege or pursuant to 5 U.S.C. § 552(b)(5) or (6)." Pet. App. 25a.

b. The district court issued a separate order dismissing petitioner's *Bivens* action against the indi-

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[5] In that regard, the court noted that the "record * * * indicates that the OSC made sufficient inquiry into [petitioner's] claims * * * [and had] found that there was insufficient evidence of any prohibited personnel practices or other violations of law, rule, or regulation within [its] investigative jurisdiction." Pet. App. 18a (internal quotation marks omitted).

The court also concluded that, "even absent the comprehensive scheme of the CSRA, [petitioner's] claim for a veterans' preference [under 5 U.S.C. 2108 and 3318(b)(3)] must fail." Pet. App. 22a. The court pointed out that a veteran

> is entitled to preference over non-veterans only in connection with an initial appointment to the federal service or in connection with a reduction-in-force among personnel in the same competitive level.

Ibid. Here, petitioner "was not an initial appointment and there was no reduction-in-force at issue." *Ibid.*

vidual respondents. 90-340 Pet. App. 13a-32a. Regarding the exercise of personal jurisdiction over respondents, the court found that, as alleged by petitioner,

> Dunst visited Georgia to interview him and * * * Coleman made a telephone call to notify him that he did not receive the position for which he had applied.

Id. at 16a-17a. In these circumstances, the court concluded, petitioner had "not presented a *prima facie* case that [respondents'] activities permit the assertion of jurisdiction under the Georgia long arm statute or that service of process was proper." *Id.* at 17a; see Ga. Code Ann. §§ 9-10-91, 9-10-94 (1982 & Supp. 1990). The court also held that, on the record presented, petitioner "has failed to establish the necessary minimum contacts with the State of Georgia, with respect to the allegations of the complaint, to give [the] court jurisdiction over [respondents]." 90-340 Pet. App. 21a. Accordingly, the court dismissed petitioner's action under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction over respondents.[6]

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[6] For reasons similar to those articulated in the order dismissing petitioner's action against HHS, the district court alternatively held that petitioner

> may not obtain *Bivens* relief against federal officials in their individual capacities in this case as Congress has provided comprehensive procedural and substantive provisions which give meaningful remedies against the United States by way of the CSRA.

90-340 Pet. App. 29a. The court also rejected petitioner's claim for a veterans' preference for the reasons given in the HHS case. *Id.* at 30a-31a.

The district court also denied petitioner's motion for leave to amend his complaint in order to seek mandamus relief

3. The court of appeals affirmed. Pet. App. 1a-12a.[7] With respect to petitioner's personnel claims against HHS, the court of appeals held that, under this Court's decision in *United States* v. *Fausto*, 484 U.S. 439 (1988), the CSRA—not recourse to federal court—was petitioner's "exclusive remedy." Pet. App. 7a; see, *e.g.*, *Towers* v. *Horner*, 791 F.2d 1244, 1246 (5th Cir. 1986). The court rejected petitioner's argument that review was otherwise available under the Administrative Procedure Act or by writ of mandamus, concluding that the "comprehensive nature of the . . . CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA, or not at all," Pet. App. 8a (internal quotation marks and citation omitted), and that "[n]o right to mandamus exists where other adequate remedies are available," *ibid.*[8]

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against respondents under 28 U.S.C. 1361 "and to seek injunctive relief under the court's common law equitable jurisdiction." 90-340 Pet. App. 31a. The court determined that "an amendment * * * would effect an undue delay in this case," and that since petitioner is not entitled to relief under decisions such as *Bush* v. *Lucas*, 462 U.S. 367 (1983), an amendment "would be futile." 90-340 Pet. App. 31a.

[7] The court of appeals consolidated petitioner's appeals from the district court's orders dismissing his actions against HHS and the individual respondents.

[8] The court further concluded that petitioner's "argument based on alleged deprivations of constitutional rights also cannot carry the day." Pet. App. 8a. The court pointed out that in *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), this Court

> has recently explained that it will not permit additional remedies for alleged constitutional violations where "Congress has provided what it considers adequate reme-

Turning to petitioner's *Bivens* action against the individual respondents, the court held that "the comprehensive statutory scheme established by Congress relating to federal employment (CSRA) precludes the maintenance of job-related Bivens actions by federal employees." Pet. App. 10a-11a (citing *Chilicky*, 487 U.S. at 424). The court rejected petitioner's reliance on the First Amendment, concluding that petitioner's "contentions are limited to a matter of acute personal interest—a job; his contentions do not implicate the type of public concern discussed in [*Connick* v. *Myers*, 461 U.S. 138 (1983)]." Pet. App. 11a. And the court determined that petitioner's reliance on *Webster* v. *Doe*, 486 U.S. 592 (1988), was mistaken since "*Webster* has nothing to do with *Bivens* actions." Pet. App. 11a.[9]

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dial mechanisms for constitutional violations that may occur in the course of its administration."

Pet. App. 8a (quoting *Chilicky*, 487 U.S. at 423). The court therefore reiterated that the "CSRA provides adequate remedial mechanisms." Pet. App. 8a.

The court of appeals also briefly addressed and rejected petitioner's FOIA claim against HHS, holding that

> [t]he information requested by [petitioner] and not disclosed by HHS is privileged as inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency, * * * or as an unwarranted invasion of privacy.

Pet. App. 11a (internal quotation marks and citations omitted).

[9] The court of appeals also agreed with the district court that petitioner was not entitled to a veterans' preference. Pet. App. 12a. Lastly, the court "agree[d] with the district court's refusal to exercise personal jurisdiction over [the individual respondents]," but "elected not to discuss this issue [in light of its holding on the merits of petitioner's claims]." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 14-16; 90-340 Pet. 6-15) that, in applying for the position of Regional Attorney in the Department of Health and Human Services, he was entitled to a preference under the Veterans Preference Act, 5 U.S.C. 2108 and 3318(b)(3). That contention is wide of the mark. As federal courts have long recognized, "[a] veteran is entitled to preference over non-veterans only in connection with an initial appointment to the federal service or in connection with a reduction-in-force among personnel in the same competitive level." *Qualls* v. *United States*, 678 F.2d 190, 196-197 (Ct. Cl. 1982); see, *e.g.*, *Crowley* v. *United States*, 527 F.2d 1176, 1183 (Ct. Cl. 1975). Neither circumstance obtained in this case, since petitioner sought a *promotion* to the post of Regional Attorney.[10]

2. Petitioner also claims (Pet. 16-29) that HHS improperly withheld documents under Exemptions 5 and 6 of the Freedom of Information Act. That fact-specific claim is insubstantial. As this Court has made plain, the privacy interests implicated by Exemption 6 are sufficiently broad to cover personnel files, particularly where, as here, disclosure would "reveal[] little or nothing about [the] agency's own conduct." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1481 (1989); see, *e.g.*, *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 600 (1982); *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976). And petitioner's asserted right to be able

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[10] Moreover, as both the district court and the court of appeals held, petitioner's exclusive remedy lies under the CSRA and does not include recourse to judicial review in these circumstances. See Pet. App. 7a, 18a-22a.

to monitor the agency's activities does not outweigh the privacy interests at stake. See, *e.g.*, *Miller* v. *Bell*, 661 F.2d 623, 630 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982).

Moreover, the documents sought, including HHS ranking and scoring matrices of the unsuccessful applicants, fall well within Exemption 5 covering predecisional intra-agency documents. See 5 U.S.C. 552(b)(5). Petitioner is mistaken in suggesting that this exemption applies only to documents that involve agency policy, see, *e.g.*, *National Wildlife Federation* v. *United States Forest Service*, 861 F.2d 1114, 1118 (9th Cir. 1988),[11] and the fact that HHS released documents relating to one candidate—the successful applicant—did not waive the agency's ability to claim the exemption concerning other candidates' documents, see, *e.g.*, *Mobil Oil Corp.* v. *EPA*, 879 F.2d 698 (9th Cir. 1989).

3. Petitioner further contends (90-340 Pet. 23-27) that the district court erred in dismissing his *Bivens* action against the individual respondents for lack of personal jurisdiction. On the basis of petitioner's submissions, the record here shows that respondent Coleman's connection with the Northern District of Georgia consisted of one telephone call from Washington, D.C., to petitioner in Atlanta, and that respondent Dunst's pertinent nexus amounted to her interviews of petitioner and two other applicants

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[11] Petitioner errs in relying (Pet. 26) on *Wolfe* v. *Department of Health & Human Services*, 815 F.2d 1527 (D.C. Cir. 1987), for the proposition that Exemption 5 does not protect the factual details of the agency's decision-making process. The D.C. Circuit, sitting en banc, later vacated and reversed the panel's construction of Exemption 5. *Wolfe* v. *Department of Health & Human Services*, 839 F.2d 768, 773 (1988).

conducted over the course of one day. In these circumstances, the district court's dismissal for lack of personal jurisdiction, upheld by the court of appeals, is unexceptionable. See *Omni Capital Int'l Ltd.* v. *Rudolf Wolff & Co.*, 108 S. Ct. 404 (1987); *Delong Equipment Co.* v. *Washington Mills Abrasive Co.*, 840 F.2d 843, 847 (11th Cir. 1988).[12]

4. Finally, petitioner contends (90-340 Pet. 11-23) that, despite the CSRA, he may pursue a *Bivens* action based on the responsible federal officials' employment decision. In light of the district court's lack of personal jurisdiction over the individual respondents, this case does not even present that issue for this Court's review. In any event, that contention is meritless. In light of this Court's trilogy of recent decisions—*Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), *United States* v. *Fausto*, 484 U.S. 439 (1988), and *Bush* v. *Lucas*, 462 U.S. 367 (1983)—the courts of appeals have uniformly held that a government employee may not pursue a *Bivens* claim for adverse personnel actions in light of the comprehensive scheme set forth in the CSRA.[13]

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[12] Petitioner's invocation (90-340 Pet. 24, 27) of the federal official venue statute, 28 U.S.C. 1391(e), is off the mark because that statute has no application to *Bivens* actions. *Stafford* v. *Briggs*, 444 U.S. 527 (1980).

[13] See, *e.g.*, *Brothers* v. *Custis*, 886 F.2d 1282, 1284-1285 (10th Cir. 1989); *Feit* v. *Ward*, 886 F.2d 848, 855-856 (7th Cir. 1989); *Hill* v. *Department of the Air Force*, 884 F.2d 1318, 1321 (10th Cir. 1989) (per curiam); *Volk* v. *Hobson*, 866 F.2d 1398, 1402-1404 (Fed. Cir.), cert. denied, 109 S. Ct. 2435 (1989); *Kotarski* v. *Cooper*, 866 F.2d 311, 312 (9th Cir. 1989); *McIntosh* v. *Turner*, 861 F.2d 524, 525-527 (8th Cir. 1988); *Spagnola* v. *Mathis*, 859 F.2d 223, 228-229 (D.C. Cir. 1988) (per curiam) (en banc); *Pinar* v. *Dole*, 747 F.2d 899, 909 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985);

To the extent petitioner contends (Pet. 8-14) that decisions such as *Chilicky*, *Fausto*, and *Lucas* do not bar his constitutional claims for equitable relief against HHS, this case is not a suitable vehicle for addressing that issue. First, as both the district court (Pet. App. 14a-22a) and the court of appeals (*id.* at 5a-11a) correctly determined, petitioner's constitutional claims, like his statutory claims, are makeweight. Accordingly, even if equitable relief were available, petitioner would not have been entitled to it. Second, the courts of appeals have generally agreed that, in light of this Court's decisions and the comprehensive remedial scheme of the CSRA, equitable relief is unavailable against the government employer. See, *e.g.*, *Lombardi* v. *Small Business Administration*, 889 F.2d 959, 961-962 (10th Cir. 1989); *Braun* v. *United States*, 707 F.2d 922, 926-927 (6th Cir.), cert. denied, 464 U.S. 991 (1983); but see *Spagnola* v. *Mathis*, 859 F.2d 223, 229-230 (D.C. Cir. 1988) (per curiam) (en banc) (stating in dicta that equitable constitutional claims are not "altogether" precluded by the CSRA). In the absence of any square conflict among the lower courts regarding the availability of equitable relief, and in view of the insubstantial nature of petitioner's claims against HHS here, further review of that issue is unwarranted.

Braun v. *United States*, 707 F.2d 922, 926 (6th Cir. 1983); *Broadway* v. *Block*, 694 F.2d 979, 985 (5th Cir. 1982).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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